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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SUE SUTER, *et al.*,
Petitioners,

v.

ARTIST M., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter "ABA"] is a voluntary, national membership organization of the legal profession. Its more than 350,000 members come from every state and territory and the District of Columbia. The constituency of the ABA includes attorneys, judges, law school professors, legislators, and a number of non-lawyer Associates in allied fields. Since its inception over one hundred years ago, the ABA has taken an active interest in the improvement of the administration of justice and the judicial process. In recent years, it has given special attention to the handling of child maltreatment cases by the courts.

The Association, with the written consent of the parties,[1] submits this brief as amicus curiae supporting respondents to call the Court's attention to the impact of this case on the administration of justice in state juvenile and family courts throughout the United States.

The Association's interest in improving the legal and judicial system's handling of cases involving child abuse and neglect has long encompassed the issues presented by this litigation. In August, 1980, the ABA House of Delegates adopted a resolution in support of the federal Adoption Assistance and Child Welfare Act of 1980 (hereinafter "AACWA"), the legislation at issue in this case. In August, 1988, the ABA House of Delegates adopted a resolution supporting a private cause of action to enforce the AACWA.[2]

Since 1978, the ABA Young Lawyers Division has sponsored the ABA Center on Children and the Law. The Center has worked intensively to support the effective implementation of the AACWA. This work has included ongoing technical assistance to a wide range of national, state, and local organizations and professional education throughout the United States. The Center has also conducted scholarly studies of the implementation of the Act and published many articles, monographs, and book chapters on the subject. The following are some of the principal works published by the Center on the AACWA, presented in chronological order. M. Hardin, *Several Perplexing Issues Concerning the Adoption Assistance and*

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[1] Copies of the letters indicating the parties' consent have been filed with the Clerk of the Court.

[2] The resolution calls for an amendment to the AACWA to clarify that there is a private cause of action under the Act. The accompanying report explains that while most courts have held that the AACWA creates a private right of action, until the matter is settled it will continue to complicate litigation. The report also emphasizes the important role that litigation has played in ensuring full implementation of the AACWA and in clarifying its provisions. *Reports of American Bar Association*, 122C (August, 1988), pp. 4, 16-17.

Child Welfare Act of 1980 (1981); M. Hardin, *The Adoption Asisstance and Child Welfare Act of 1980: An Introduction for Juvenile and Family Court Judges* (1983); Allen, Golubock, & Olson, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in Foster Children in the Courts 575 (M. Hardin ed. 1983); English, *Litigating Under the Adoption Assistance and Child Welfare Act of 1980*, in Foster Children in the Courts 612 (M. Hardin ed. 1983); D. Dodson, *The Legal Framework for Ending Foster Care Drift: A Guide to Evaluating and Improving State Laws, Regulations and Court Rules* (1983); Hardin & Shalleck, *Children Living Apart From Their Parents*, in Legal Rights of Children § 9.12 (R. Horowitz & H. Davidson eds. 1984); M. Hardin & A. Shalleck, *Court Rules to Achieve Permanency for Foster Children: Sample Rules and Commentary* (1985); Hardin, *Ten Years Later: Implementation of P.L. 96-272 By the Courts*, in The Adoption Assistance and Child Welfare Act of 1980: The First Ten Years 51 (North American Council on Adoptable Children ed. 1990).

In addition to general works on the AACWA, the Center has focused intensively on the "reasonable efforts" requirements of the Act. In 1983, before the reasonable efforts requirement went into effect, the Center distributed a comprehensive memorandum on the requirement, M. Hardin, *The Required Judicial Determination of Reasonable Efforts to Prevent Removal and Reunify the Family* (1983), to the appropriate public child welfare agencies in all 50 states. This memorandum was used as a basis for policy and legislation in many states.

In 1985, the Center followed up by publishing a monograph specifically on reasonable efforts, D. Dodson, *Reasonable Efforts to Prevent Foster Placement: A Guide to Implementing the "Reasonable Efforts" Requirements of Public Law 96-272 Through Judicial Determinations and State Policy* (1985). Also in 1985, the Center received a federal grant to study and provide guidance con-

cerning the reasonable efforts requirements. This culminated in the publication of a project report, a manual for judges, and a general guide to implementation. *See* T. Stein & G. Comstock, *Reasonable Efforts: A Report on Implementation by Child Welfare Agencies in Five States* (1987); D. Ratterman, *Reasonable Efforts: A Manual for Judges* (1987); D. Ratterman, D. Dodson, & M. Hardin, *Reasonable Efforts to Prevent Foster Placement: A Guide to Implementation* (1987).

Since that time, the Center's staff has continued to write, consult, and provide training on the subject throughout the United States. *See* Hardin, The *Judicial Determination of Reasonable Efforts: How and Why*, 6 Protecting Children 7 (1989); Hardin, *Ten Years Later: Implementation of P.L. 96-272 By the Courts*, *supra* p. 3, at 54-55. Recent staff writing also has included state-specific analyses and training materials on reasonable efforts.

SUMMARY OF ARGUMENT

When states fail to make "reasonable efforts," in accordance with 42 U.S.C. § 671(a)(15), the legal system cannot achieve justice for abused and neglected children. Without a private right of action, there is no effective means to compel states to make reasonable efforts.

Meaningful system-wide efforts by public child welfare agencies to work with families is essential to the administration of justice for abused and neglected children. It is only through trying to work with families that agencies can uncover vital facts about the current behavior and condition of parents and about their ability and willingness to improve. If there is no operative state plan ensuring some basic, system-wide efforts to work with families to prevent needless removal of children from their homes and to return them home after removal, then state juvenile and family courts cannot make informed and timely decisions affecting the lives and safety of some

of our nation's most vulnerable children. In the face of inadequate information due to agency failures to work with families, courts are severely handicapped in their ability to decide whether to remove children from their families, whether to return children home, and whether to authorize the adoption of children unable to return home.

Judicial determinations of reasonable efforts, made by state court judges in individual cases pursuant to 42 U.S.C. § 672(a)(1), are no substitute for a private right of action to enforce 42 U.S.C. § 671(a)(15). First, persistent system-wide agency failures to assist families prevent judges from making valid judicial determinations of reasonable efforts in individual cases. Second, fundamental flaws in state statutes and procedures that are condoned by the Federal Government, and severe limitations in judicial resources, prevent juvenile court judges from rigorously reviewing reasonable efforts. Third, even if courts were able to make proper reasonable efforts determinations in individual cases, case-by-case judicial determinations of reasonable efforts are intrinsically inadequate as a remedy for system-wide deficiencies.

Federal enforcement of the AACWA through administrative monitoring does not attempt to address states' systemic failures to make reasonable efforts. The Federal Government requires only that there be present in individual case files agency and court documents which recite that reasonable efforts were made. As a result, states can ensure that they meet federal requirements simply by amending their child welfare agency and court forms.

Accordingly, without a private cause of action to enforce reasonable efforts on a system-wide basis, there is no effective remedy for grave systemic failures to provide reasonable efforts.

ARGUMENT

I. WITHOUT SYSTEM-WIDE REASONABLE EFFORTS BY PUBLIC CHILD WELFARE AGENCIES, STATE JUVENILE COURT JUDGES CANNOT PROPERLY FULFILL THEIR STATUTORY DUTIES TO CHILDREN AND FAMILIES.

The AACWA requires that public child welfare agencies implement a state plan which ensures, for each child who may be placed into foster care, that reasonable efforts will be made to prevent the need for placement and, if placement becomes necessary, to make it possible for the child to return home. 42 U.S.C. § 671(a)(15). Public child welfare agencies, which may be state or locally administered,[3] are agencies legally charged with investigation of child maltreatment and placement of maltreated children into foster care. *See generally* M. Soler, J. Bell, E. Jameson, C. Shauffer, A. Shotton & L. Warboys, *Representing the Child Client* § 4.02 (1989).

Without such reasonable efforts by public child welfare agencies, state juvenile courts[4] cannot fulfill their statutory responsibilities toward abused and neglected children and their families. When agencies fail to make reasonable efforts, they necessarily fail to acquire and provide information about children and families that courts must have in order to decide cases in accordance with the mandates of state and federal law. As a result, judicial decisions are seriously compromised, both in quality and in timeliness.

In child protection cases, juvenile courts are charged with making a series of decisions concerning the child and family. For example, in a single case, a court may need to make the following sequence of decisions: (a) a

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[3] *See* 42 U.S.C. § 672(a)(2).

[4] "Juvenile courts," as used in this brief, refers to state courts having jurisdiction over non-criminal child abuse and neglect cases.

decision whether a child should be removed from home in an emergency; (b) a decision whether to transfer legal custody of a child to an agency; (c) a decision whether to approve a case plan submitted by an agency that is designed to assist the family; (d) a decision whether to authorize the child's return home; and (e) after determining that the child cannot safely be returned home within a reasonable time, a decision whether to terminate parental rights and authorize adoption. *See generally* L. Granik, *Representing Parents in Child Protection Cases: A Basic Guide for Attorneys* (1988); M. Soler, J. Bell, E. Jameson, C. Shauffer, A. Shotton & L. Warboys, *supra*, §§ 4.08-4.15. In arriving at these decisions, the court depends upon the agency for information about how the parents may have maltreated the child, the current behavior and condition of the parents, and the likelihood that the parents' care of the child will improve.[5]

In order to assure that the court receives reliable information concerning the current behavior and condition of the parents and the likelihood that they will improve, agency efforts to assist the family are essential. Critical facts can only be uncovered through work with the family. With few exceptions, the state or local child welfare agency must go through the process of trying to help preserve a family in order to make decisions, formulate plans, and, ultimately, decide how best to achieve a safe and permanent home for the child.[6] Only through

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[5] For a description of types of information that the court needs at different stages of child protection proceedings, see, e.g., M. Hardin & A. Shalleck, *Court Rules to Achieve Permanency for Foster Children: Sample Rules and Commentary* 37-40, 62-65, 81-85, 110-111 (1985). For a thorough overview of juvenile court child protective decision-making issues at the different stages, as seen from the perspective of a child advocate, see D. Duquette, *Advocating for the Child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates* 47-110 (1990).

[6] Sometimes, child welfare agencies first come into contact with families in emergencies, where abuse is so severe or parental be-

the agency's efforts to work with the family can the court obtain complete information concerning the current danger to the child, the parents' willingness to work with and cooperate with the agency, the parents' capacity to improve, and the types of help that are available to the family.

Both the state juvenile courts and the advocates practicing before them are heavily dependent upon agencies to develop information concerning the child and family. Throughout the court process, agencies are expected to present specific written information [7] and testimony.

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havior so dangerous that it is necessary to immediately remove the children from home. *See, e.g.*, N.C. Gen. Stat. §§ 7A-577(h), 7A-651(c)(2) (1989); W.Va. Code § 49-6-3(a), (b) (Supp. 1991). Even in such cases, however, agencies generally must work with the family after removal, to try to achieve reunification if that is what the parents want. Only in unusual cases, such as where it is possible to achieve the prompt involuntary termination of parental rights, is the agency excused from trying to work with the family. In these cases, the facts must be strong enough to show that the likelihood of safe reunification is *remote*. An example of such a situation might be a parent with a long-term emotional disorder such as schizophrenia, severe enough to render the particular parent incapable of caring for the child in question. For a discussion of grounds for the termination of parental rights that do not require proof of agency efforts to rehabilitate the family, see Hardin & Shalleck, *Children Living Apart From Their Parents*, in Legal Rights of Children §§ 9.19-9.20 (R. Horowitz & H. Davidson eds. 1984); Mlyniec, *Prosecuting a Termination of Parental Rights Case*, in Foster Children in the Courts 202-209 (M. Hardin ed. 1983).

[7] Typical points at which agencies are required to submit the court reports or other written information include: (a) prior to an emergency hearing following the *ex parte* removal of a child; (b) prior to the disposition hearing where, after determining that a child has been abused or neglected, the court decides whether to transfer legal custody to the agency and to authorize foster placement; (c) upon the completion of a case plan within a specific deadline; (d) prior to a periodic review hearing where the court monitors case progress or makes a decision concerning the permanent placement of the child; and (e) prior to a proceeding concerning the termination of parental rights in anticipation of adoption. *See, e.g.*, Va. Code Ann § 16.1-252(B) (Supp. 1991) (emergency removal);

Without agency reasonable efforts, the information available to and presented by the agency is necessarily incomplete, thus also handicapping children's and parents' advocates in their ability to present relevant testimony and arguments to the court.

When agency failures to make reasonable efforts are *system-wide*, *i.e.*, when agency failures go well beyond the errors of caseworkers or supervisors in individual cases, the effect on judicial decision-making is particularly corrosive. While courts can take action to pressure or compel agencies to correct the failures of individual caseworkers or supervisors—thus providing the court with critical information before the case drags on too long—courts cannot, on a case-by-case basis, compel agencies to correct system-wide failures to provide reasonable efforts. Moreover, in the face of chronic system-wide failures, courts cannot reasonably predict how the agency is likely to deal with the family should the court make a particular decision in the case.

For example, when agencies fail to identify and provide services to families on a timely and dependable basis, courts cannot properly evaluate individual agency case plans, cannot conduct effective periodic case reviews, and will find it difficult to make critical case decisions. Among the key judicial decisions affected are the decisions whether to: (a) authorize the removal of a child; (b) order family reunification; and (c) terminate parental rights.

Ky. Rev. Stat. Ann. § 610.100 (Baldwin 1987) (disposition); Ohio Rev. Code Ann. § 2151.412(A), (C) (Anderson 1990) (case plan); Ind. Code Ann. § 31-6-4-19(b) (West Supp. 1990) (periodic review); Conn. Gen. Stat. Ann. § 45a-717(e)(1) (West Supp. 1991) (termination of parental rights).

A. In the Face of Serious, Large-Scale Agency Failures to Make Reasonable Efforts, Courts Cannot Properly Decide Whether to Authorize the Removal of Children From Their Homes.

State law instructs courts not to order the removal of children when there are safe and appropriate alternatives to removal.[8] But if an agency *routinely fails* to make reasonable efforts to prevent removal after determining that children are in danger, state courts will find it impossible to make informed decisions concerning whether safe alternatives to removal exist.

Failure to make reasonable efforts, on a system-wide basis, to prevent the need for foster placement can affect subsequent judicial placement decisions in two ways. First, because of the agency's inveterate failures to make efforts to work with families, courts are less able to assess the seriousness of the abuse or neglect, the cooperativeness of parents, and the parents' ability to safely care for their children. Because the failures are system-wide, courts trying individual cases have no way to correct them.

Second, because of the agency's failure to be consistent or predictable in its help to families, courts cannot depend upon the agency prospectively to provide safeguards to protect children in their homes (*e.g.*, arranging for home visitors to monitor children's safety). This prevents courts from determining whether the agency will take

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[8] *See, e.g.*, Cal. Welf. & Inst. Code § 361(b)(1) (Deering Supp. 1991) (no child shall be removed from home unless there is substantial danger to the child's health and there are no reasonable means that the child's health can be protected without removing the child); Fla. Stat. Ann. § 39.402(7), (8a) (West Supp. 1991) (no child shall be removed from home if with appropriate and available services the child could remain safely at home); Minn. Stat. Ann. § 260.011 (Subd.2)(a) (West Supp. 1991) (the purpose of the juvenile laws is to preserve and strengthen the child's family ties, removing a child from parents only when child cannot be adequately safeguarded without removal).

sufficient steps to protect any particular child if the child is allowed to remain at home.

When agencies fail to make timely and active efforts to assist families and to accurately project the kinds of help that they will provide, they place courts in a serious dilemma. Courts may choose to authorize the removal of children, knowing that it may be unnecessary, or they may leave children in situations that might be dangerous. Either type of decision has potentially tragic consequences for children and can subject the court to public criticism.

For example, a common type of child neglect occurs when small children are not supervised and left in situations dangerous to their life or health (*e.g.*, unattended at home, allowed to wander into the street, unclothed outside in winter, and exposed to poisons). *See generally* D. Besharov, *Recognizing Child Abuse* 108-112 (1990); Davidson & Horowitz, *Protection of Children From Family Maltreatment*, in Legal Rights of Children § 7.04 (R. Horowitz & H. Davidson eds. 1984). These situations can have a variety of causes: parental drug use, parents in temporary emotional crises, parental misjudgment in trusting someone else to care for their children, parental mental illness, parental character disorders, parental mental incapacity, and a range of other possibilities. Agencies and courts need to know the causes of parents' failures to supervise in order to determine whether children must be removed from home. They need to know the causes of each episode of maltreatment to determine whether parents are likely to allow the situation to recur and to determine whether there are possible ways to safeguard children without removal.

If, after discovering that children are dangerously unsupervised, an agency often fails to make caseworkers available to visit or to assist parents for several days, and if that agency then routinely seeks court authority to place the children outside the home, the court is in a

difficult position. The court has no factual basis to make informed placement decisions in many cases, yet it may feel compelled to approve requests for removal out of caution for children's safety. The following example is illustrative:

> In a situation involving parental non-supervision, the agency might discover that the parent is going through an apparently temporary emotional crisis due to a recent marital separation, and that she suffers temporary lapses in her attentiveness to her children. In addition, the agency might easily locate a relative who is available to help watch the children until the situation subsides. Finally, the agency might arange for day care during the times that the relative would not be in the home.

Federal law and state statutes state a preference for such solutions, so that children can be safeguarded in their own homes.[9] Yet, such solutions are impossible if the court cannot depend upon and cannot compel the prompt assignment of caseworkers during critical periods of the case. Such solutions are impossible if the court has no way of knowing which services are available and, even if available, whether they will actually be provided

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[9] Implicit in the federal requirement of reasonable efforts to prevent placement is a preference to maintain children in their own homes when they can remain there safely. As stated by the leading U.S. Senate sponsor of the AACWA:

> In the past, foster care has often been the first option selected when a family is in trouble: the new [reasonable efforts] provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunite families.

126 Cong. Rec. S6942 (daily ed. June 13, 1980) (statement of Sen. Cranston). Also reflecting the preference to maintain children in their own homes is the related requirement that public child welfare agencies implement a preplacement preventive service program designed to help children remain with their families. 42 U.S.C. § 627(b)(3). Many states have equally clear statutory preferences. *See supra* note 8.

to the family. To summarize: in the face of system-wide failures to provide reasonable efforts, courts are forced to authorize needless removal of children from their homes or to leave children in situations of potential danger.

B. When Agencies Systematically Fail to Make Reasonable Efforts, Courts Cannot Properly Decide Whether to Authorize the Return of Children to Their Homes.

If a child welfare agency routinely fails to make reasonable efforts to reunify children with their families, courts are powerless, in individual cases, to make informed and timely decisions concerning whether children should be allowed to return home. Agencies must work with families before they can evaluate the feasibility of reunification, and courts need to know the results of such work before they can make an informed decision on reunification.

The AACWA and many state laws call for timely judicial decisions concerning the return of children to their families.[10] These provisions implement one of the

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[10] The AACWA requires a hearing, within 18 months of the time of placement, to determine the future legal status of the child. 42 U.S.C. § 675(5)(C), *explained in* Allen, Golubock, & Olson, *supra* p. 3, at 582-584. *See also* D. Dodson, 3 Comparative Study of State Case Review Systems Phase II: Dispositional Hearings, Chapter 2 (Westat/ABA 1984). Many state laws and procedures establish shorter and more strictly applied time limits for judicial decisions concerning the permanent placement of children. *See, e.g.*, Mich. Comp. Laws Ann. § 712A.19a (West Supp. 1991). *See also* Cal. Welf. & Inst. Code §§ 364-366.26 (Deering Supp. 1991), *explained in* California Continuing Education of the Bar, 2 *California Juvenile Court Practice* §§ 21.4, 21.4A (1981 & 1990 Supp.); Ohio Rev. Code Ann. § 2151.415 (Anderson 1990), *explained in* L. Granik, C. Cunningham, D. Colley & M. Hardin, *Ohio Child Welfare Legal Manual* § 5.4 (1990); Haw. Rev. Stat. §§ 587-72, -73 (1988), *explained in* Child and Parent Advocates Section, Hawaii State Bar Association, *Attorney's Manual For Handling Child Abuse and Neglect Cases In Hawaii* 3-37 to 3-42 (F. Kimura ed. 1989).

basic purposes of the AACWA: to prevent needlessly prolonged foster placements.[11]

When recurrent problems in agency staffing or service planning make it impossible to provide services according to timetables specified in agency case plans, judicial decision-making becomes paralyzed. That is, where services to families are delayed for prolonged periods of time, either because agencies fail to provide timely services, or because cases are left uncovered so that there is no one available to arrange services, courts have no basis upon which to decide whether it is safe to return the child home.

Such circumstances force juvenile court judges to choose between leaving children in needlessly prolonged foster care, prematurely terminating reunification efforts by authorizing new permanent homes, or returning children to conditions where their safety is in question. The following example illustrates the point:

> An agency placed an infant into emergency foster care who was severely underweight due to malnutrition. The mother is young and does not understand the rudiments of child nutrition. Only after teaching the parent how to select and prepare food for the infant might it be safe to return the child.

If the agency has been working with the mother and the mother is cooperative, *if* the court is informed of an available nutritional program, and *if* the program can monitor the baby and ensure its safety, then the court might find it safe to authorize the child's return home. Arguments before the court could focus on the nature of the immediate danger to the child and the ability of the program to ensure the child's safety.

But *if*, on the other hand, the agency in question is slow and haphazard in its assignment of caseworkers and

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[11] *See, e.g.*, S. Rep. No. 336, 96th Cong., 2nd Sess. 10-12 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News, 1459-1461.

delivers services in a chaotic and unpredictable manner, such results are highly unlikely. Because of these agency failures, the mother's problem will be identified after the infant has been away from home a needlessly long time (or may never be identified), and the agency will not know in advance if or when the instructional program will be available to the parent. Legal advocacy and judicial decision-making concerning family reunification will be handicapped. The court will not be able to meet its statutory obligation to reach a timely reunification decision.

C. Confronted With Agency-Wide Failures to Make Reasonable Efforts, Courts Cannot Make Timely Decisions to Free Children for Adoption.

When agencies fail to make reasonable efforts to prevent placement and to reunify families, courts also are unable to make informed decisions whether to terminate parental rights and legally free children for adoption. This condemns children to remain in needlessly prolonged unplanned foster placements, contrary to the purposes of the AACWA.

After children have remained in foster care for extended periods of time, decisions are needed concerning whether they should be returned home or placed in alternative permanent homes, such as through an adoption. When children cannot be returned home and parents refuse to consent to adoption, termination of parental rights proceedings sometimes are necessary.

In most cases, for courts to order the involuntary termination of parental rights there must be proof that agencies have actively, but unsuccessfully, worked toward achieving family reunification.[12] While there are

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[12] *See, e.g.*, Ala. Code § 26-18-7(a)(6) (1986) (in determining whether grounds for termination of parental rights exist, the court shall consider whether the agency's reasonable efforts have failed); La. Rev. Stat. Ann. § 13:1601(D)(4), (F)(4) (West 1983) (to

cases that are so extreme that it is possible to terminate parental rights without attempting to work with particular families—*e.g.*, due to egregious maltreatment or demonstrably hopeless parental incapacity—these cases are uncommon. *See* Mlyniec, *Prosecuting a Termination of Parental Rights Case*, in Foster Children in the Courts 193, 207 (M. Hardin ed. 1983).

Therefore, when services are repeatedly delayed and when there are prolonged periods where there is no caseworker available to arrange services, there often is no legal basis for a termination of parental rights—even for children who, in fact, will never return home. In such situations, courts have no choice but to permit children to remain indefinitely in impermanent foster placements and to keep parents in indefinite suspense concerning the fate of their families.

In fact, in a recent report of the Inspector General of the U.S. Department of Health and Human Services, administrative barriers in the child welfare delivery system were found to be the most significant source of delays in freeing children for adoption. In particular, the report emphasized that "states are not timely or effective in meeting 'reasonable efforts to reunite families' requirements which are prerequisites to permanent placement." In a survey conducted for the report, over 75% of the respondents indicated that the failure of state agencies to meet the "reasonable efforts" standard to the satisfaction of the courts is *the primary barrier* to implementing permanent plans of adoption for children in foster care who are unable to return home. U.S. Department of Health and Human Services, Office of Inspector General, *Barriers to Freeing Children for Adoption*, 11-13 (1990).

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establish certain statutory grounds for termination of parental rights, the department must show reasonable efforts); R.I. Gen. Laws § 15-7-7(1)(c), (2)(a) (1988) (to establish certain statutory grounds for termination of parental rights, the agency must show reasonable efforts).

II. JUDICIAL DETERMINATIONS OF REASONABLE EFFORTS, MADE BY STATE JUVENILE COURTS IN INDIVIDUAL CASES PURSUANT TO 42 U.S.C. § 672(a)(1), ARE *NOT* A SUFFICIENT MEANS OF ENFORCING THE REASONABLE EFFORTS REQUIREMENT.

There are two reasonable efforts requirements of the Adoption Assistance and Child Welfare Act of 1980. The first, the enforceability of which is at issue in this litigation, is that state child welfare agencies must have a plan which provides that "in each case, reasonable efforts shall be made (A) prior to the placement of a child, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U.S.C. § 671(a)(15).

Second, there must be a *judicial determination* (finding), by the court authorizing removal of a child, to the effect that such reasonable efforts have been made. This determination is required for a child to be eligible for federal foster care matching funds under Title IV-E of the Social Security Act. The child will be eligible only if:

> [T]he removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in [42 U.S.C. § 671(a)(15)] have been made. 42 U.S.C. § 672(a)(1).

To paraphrase, in order for a child entering foster care as the result of court proceedings to be eligible for federal foster care matching funds, there must be a judicial finding that the agency has made the reasonable efforts described in 42 U.S.C. § 671(a)(15).

This judicial determination requirement is not sufficient, in itself, systematically to enforce agency obligations to provide reasonable efforts pursuant to 42 U.S.C.

§ 671(a)(15). This is true because: (a) large-scale agency failures to provide reasonable efforts undermine the value of case-by-case judicial determinations of reasonable efforts; (b) many state and local jurisdictions ineffectively implement case-by-case judicial determination of reasonable efforts; and (c) case-by-case judicial determinations of reasonable efforts cannot effectively remedy systemic problems.

A. Large-Scale Agency Failures to Make Reasonable Efforts Undermine the Value of Judicial Determinations of Reasonable Efforts in Individual Cases.

Just as large-scale agency failures to make reasonable efforts make it difficult for judges to make removal, reunification, and termination of parental rights decisions, such failures make it extremely difficult for judges effectively to fulfill their responsibilities under 42 U.S.C. § 672(a)(1). When faced with grave system-wide problems, juvenile court judges making reasonable efforts determinations face a dilemma. They must choose between accepting system deficiencies (and thus making an affirmative—but false—reasonable efforts determination) or routinely causing the cutting off of federal foster care funds for the placement of children within the jurisdiction—thus depriving the children of needed assistance. If problems are agency-wide and the judge is unwilling to act so that funds are cut off, the reasonable efforts sanction becomes meaningless.

By contrast, where the agency has an organized, consistent approach in providing services to families, the judicial determination can effectively address individual or local deficiencies. The court can focus on such issues as whether the individual case plan is logically related to family problems and whether the caseworker has diligently implemented that plan. The court can help ensure that appropriate services are uncovered or arranged. *See* M. Hardin, *The Judicial Determination of Reason-*

able Efforts: How and Why, 6 Protecting Children 7 (1989).

In a system where deficiencies are isolated and fairly infrequent occurrences, the court can utilize negative reasonable efforts findings as a fiscal sanction to compel the agency to act. If the agency has the capacity to correct a deficiency, the judge need not fear that a negative determination is having a harmful effect on children. Once the agency remedies the problem, the judge can then make a positive determination, allowing the matching funds to begin.[13]

B. In Many Jurisdictions, State and Local Laws, Procedures, and Resource Limitations Make the Judicial Determination of Reasonable Efforts Ineffective.

In many states, the judicial determination is structured in such a way that it can not effectively cause the public child welfare agency to improve services, even in individual cases. That is, state laws, procedures, and forms are structured in a way that precludes effective fiscal sanctions against the agency for failure to provide reasonable efforts.

While 42 U.S.C. § 671(a)(15) requires that every state plan ensure ongoing and continuous reasonable efforts—first to prevent removal and then to reunify the family—the judicial determination generally only addresses reasonable efforts at the very early stages of a case. Because 42 U.S.C. § 672(a)(1) does not explicitly require repeated reasonable efforts determinations, and because federal policy requires only one determination as a condition for state collection of matching funds,[14] most states make

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[13] A federal policy announcement states that if there is a positive judicial determination of reasonable efforts following a negative one, eligibility for federal foster care matching funds can begin after the positive determination. U.S. Department of Health & Human Services, Policy Announcement ACYF-PA-84-1 (1984).

[14] *See supra* note 13.

the determination *only* at emergency hearings and/or at the first hearing transferring custody of the child to the agency.[15] Thus, in most states, the case-by-case judicial

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[15] *See* Ark. Stat. Ann. § 9-27-328 (1991); Fla. Stat. Ann. §§ 39.402 (8)(a), 39.408(6), 39.41(4), 39.442(4), 39.464(5) (West 1988 & Supp. 1991); Ga. Code Ann. § 15-11-41(b) (1990); Idaho Code §§ 16-1605(b)(6), 16-1610(b)(2), 16-1614(e)(2), (4) (Supp. 1990); Ill. Ann. Stat. ch. 37, para. 802-10(2), para. 803-12(2) (Smith-Hurd 1990); Iowa Code Ann. §§ 232.52(6), 232.95(2)(a), 232.102(5)(b), (7) (West 1985 & Supp. 1991); Kan. Stat. Ann. §§ 38.1542(f), -1543(i), -1563(h) (Supp. 1990); Ky. Rev. Stat. Ann. § 200.595(1), (2) (Michie/Bobbs-Merrill 1991); Ky. Rev. Stat. Ann. § 610.140 (1)(c) (Baldwin 1989); La. Code Juv. Proc. Ann. art. 87(F) (West Supp. 1990); Me. Rev. Stat. Ann. tit. 15, §§ 3312(3)(B)(5), 3314 (1)(C-1) (Supp. 1990); Mich. Comp. Laws Ann. § 712A.18f(1), (4) (West Supp. 1991); Minn. Stat. Ann. §§ 260.011(Subd.2)(b)(1), 260.012(a), (b), (c), 260.155(Subd.7)(7), 260.172(Subd.1)(c), 260.191(Subd.1a)(d) (West Supp. 1991); Miss. Code Ann. §§ 43-21-301(4)(c), -309(4)(c)(i), -405(6), -603(7) (Law. Co-op. Supp. 1990); Mo. Ann. Stat. § 211.183 (Vernon Supp. 1991); Mont. Code Ann. § 41-5-523(1)(b)(i) (1989); Neb. Rev. Stat. §§ 43-246(4), -254, -284 (1988 & Supp. 1990); Nev. Rev. Stat. Ann. §§ 432B.394, 432B.550(1) (Michie Supp. 1989); N.J. Stat. Ann. § 30:4C-54 (West Supp. 1991); N.M. Stat. Ann. § 32-1-34(A)(9) (Supp. 1989); N.Y. Fam. Ct. Act §§ 352.2(b), 754(2), 1022(a), 1027(b), 1028, 1052(b) (Consol. Supp. 1990); N.Y. Soc. Serv. Law § 358-a(1), (2), (3) (Consol. Supp. 1990), N.C. Gen. Stat. §§ 7A-577(h), 7A-651(c)(2), (1989); Ohio Rev. Code Ann. § 2151.419 (Anderson 1990); Okla. Stat. Ann. tit. 10, § 1104.1(C)(1) (West Supp. 1991); 42 Pa. Cons. Stat. Ann. §§ 6332(a), 6351(b) (Purdon Supp. 1991); Tex. Fam. Code Ann. § 54.04(i)(2) (Vernon Supp. 1991); Wyo. Stat. Ann. § 14-6-229(a) (Supp. 1991). *But see* Ala. Code § 26-18-7(a)(6) (1986); Cal. Welf. & Inst. Code §§ 319(d), 361(c), 366.21(f) (Deering Supp. 1991); Ind. Code Ann. §§ 31-6-4-6(e), 31-6-4-6.6(c)(5), (6), 31-6-4-19(b), 31-6-11-10(b) (West Supp. 1990); Or. Rev. Stat. § 419.577 (3)(b), 419.784(2)(a) (Supp. 1990); S.D. Codified Laws Ann. §§ 26-8A-21, -22, -25 (Supp. 1991); Va. Code Ann. §§ 16.1-251(A)(2), -252(A), (E)(2), -282(D) (Supp. 1991); Wash. Rev. Code Ann. §§ 13.32.A170(1)(d), 13.32A.190(2), 13.34.060(8)(a), 13.34.130(1)(b), 13.70.100(5)(b) (Supp. 1991); W.Va. Code §§ 49-2-16, 49-5-13 (4)-(7), 49-6-3(a), (b), 49-6-5(a)(5), (6), 49-6-8(a) (Supp. 1991); Wis. Stat. Ann. §§ 48.355(2)(b)(6), (2c), 48.365(2m)(a), 48.38(5)(c)(7), (6)(c) (West Supp. 1990).

determination is totally ineffective as a means of enforcing reasonable efforts in the later stages of a case.

In many jurisdictions, courts use pre-printed form court orders setting forth affirmative findings that the agency has made reasonable efforts. These forms leave no blank space for recording a negative determination, nor do they prompt a description of what were the agency's efforts to assist the family. As a result, court orders automatically indicate that the judge has made an affirmative finding of reasonable efforts, when in fact the issue is typically never raised in the hearing. *See* Hardin, *Ten Years Later: Implementation of P.L. 96-272 By the Courts*, *supra* p. 3, at 54-55; *See also* Select Committee on Children, Youth, and Families, U.S. House of Representatives, *No Place to Call Home: Discarded Children in America* 55, 101st Cong., 2d Sess. (1990).

Many juvenile courts throughout the United States are unable to take time to focus on the judicial determination of reasonable efforts, because they themselves are facing a severe crisis in managing their caseloads. Faced with: (a) increasingly difficult and complex types of cases (e.g., drug-exposed infants); (b) a vastly more elaborate court process due to recent requirements of state and federal law; and (c) staggering recent increases in the size of their dockets, juvenile court hearings are necessarily truncated and often set over or continued.[16]

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[16] For further discussion of the escalating burdens placed upon juvenile courts throughout the United States, see Hardin, *Ten Years Later: Implementation of P.L. 96-272 By the Courts*, *supra* p. 3, at 58-63, and authorities cited therein. *See also* U.S. Department of Health & Human Services, U.S. Advisory Board on Child Abuse and Neglect, *Child Abuse and Neglect: Critical First Steps in Response to a National Emergency* 87 (1990). The situation in many areas, particularly in large urban courts, has reached truly crisis proportions. *See, e.g.*, New York State Bar Association, *Joint Hearings on the Caseload Crisis in Family Court, 1990* (1990) (New York City); N. Benoit & T. Izzo, *Our Children, Our Responsibility* 59-69 (1991) (Rhode Island); C. Glynn, *Precious Time: Working with Courts to Get Children Safely Home* (1988) (Miami).

Finally, a number of state statutes actually prohibit the removal of a child from the home *unless* the court makes an affirmative finding that the agency has made reasonable efforts to prevent placement. Fla. Stat. Ann. §§ 39.402(8)(a), 39.422(5) (West 1988); Idaho Code §§ 16-1605(b)(6), 16-1614(e)(2), (4) (Supp. 1990); Iowa Code Ann. §§ 232.52(6), 232.95(2)(a), 232.102(5)(b) (West 1985 & Supp. 1991); Kan. Stat. Ann. §§ 38-1542(f), 38-1543(i), 38-1563(h) (Supp. 1990); Ky. Rev. Stat. Ann. § 620.140(1)(c) (Baldwin 1989); Me. Rev. Stat. Ann. tit. 15, §§ 3312(3)(B)(5), 3314(1)(C-1) (Supp. 1990); Miss. Code Ann. §§ 43-21-301(4)(c), -309(4)(c)(i), -405(6), -603(7) (Law, Co-op Supp. 1990); Neb. Rev. Stat. §§ 43-254, -284 (1988 & Supp. 1990)); S.D. Codified Laws Ann. §§ 26-8A-21, -22 (Supp. 1991); Wash. Rev. Code Ann. §§ 13.32A.170(1)(d), 13.34.130(1)(b) (Supp. 1991); Wyo. Stat. Ann. § 14-6-229(a) (Supp. 1991). In such states, a situation cannot arise where the state loses foster care matching funds due to a negative reasonable efforts finding. In such states, the reasonable efforts requirement cannot function as a fiscal sanction for the failure to assist families. The following example explains the dilemma posed by statutes requiring a reasonable efforts finding as a precondition for out-of-home placement of a child:

> After investigating a child abuse report, a state child protection agency unreasonably fails to provide available services to a family. Later, the parents' abusive behavior deteriorates to the point that the child must be immediately removed for his own safety. By literal application of state law, the child cannot be removed because the agency failed to make reasonable efforts to prevent placement. In reality, most judges will, of course, enter the required finding that the agency did make reasonable efforts in order to protect the child, thus rendering the reasonable efforts requirement a practical nullity.

C. Judicial Determinations of Reasonable Efforts, Pursuant to 42 U.S.C. § 672(a)(1), Cannot By Themselves Correct Agencies' Large-Scale Failure to Provide Reasonable Efforts.

Even if state laws and procedures for the reasonable efforts determination were improved, and even if juvenile courts throughout the United States were able to make a proper reasonable efforts inquiry, the case-by-case judicial determination of reasonable efforts still would be intrinsically inadequate as a remedy to correct systemic deficiencies. It is impractical for individual juvenile court judges to correct system-wide problems, particularly those extending beyond their jurisdictions. Large numbers of negative reasonable efforts determinations by different judges are unlikely to follow consistent patterns in addressing systemic deficiencies in reasonable efforts. Agencies are unlikely to obtain clear direction from such determinations in the aggregate. Only through litigation to enforce reasonable efforts on a systemic basis, such as through this § 1983 litigation, can courts provide clear and consistent system-wide enforcement of reasonable efforts.

III. FEDERAL ENFORCEMENT CANNOT ENSURE SUBSTANTIVE COMPLIANCE WITH THE REASONABLE EFFORTS REQUIREMENT.

In the course of enforcing the AACWA, the Federal Government has not attempted actually to determine whether agencies make reasonable efforts to preserve families. First, while the Federal Government monitors whether agencies document steps that they deem to be reasonable efforts, it has never questioned the reasonableness of the efforts described. The Federal Government does monitor whether agency case plans describe agency activities that the agency itself deems to be reasonable efforts, but the Federal Government has never questioned whether the actions described actually constitute reasonable

efforts. *See* 45 C.F.R. §§ 1356.21(b), (d)(4), 1357.15 (e); U.S. Department of Health & Human Services, Policy Announcement ACYF-PA-84-1 (1984).

Second, the Federal Government monitors whether state courts' written findings concerning reasonable efforts have been made in each case in which federal matching funds have been claimed, but the Government has neither questioned whether the efforts were in fact reasonable, nor whether the court actually conducted any deliberations concerning reasonable efforts. In sum, the Federal Government has never qualitatively reviewed or enforced the reasonable efforts requirements. As a result, federal monitoring fails to correct systemic failures such as those at issue in this case.

The ABA does not mean to imply that the Federal Government *should or should not* qualitatively review the reasonableness of agency efforts. The fact is that it does not do so and, this being the case, the judiciary is the only source of substantive enforcement of this important federal law.

IV. THE ONLY EFECTIVE MEANS OF REMEDYING AGENCIES' SYSTEMIC FAILURES TO PROVIDE REASONABLE EFFORTS IS THROUGH A PRIVATE CAUSE OF ACTION.

Because the Federal Government does not substantively monitor reasonable efforts, and because state courts, in making individual reasonable efforts findings, cannot enforce system-wide reasonable efforts, the only effective means of enforcing such efforts is through recognition of a judicial remedy, *i.e.*, through a private cause of action. Such a remedy is important, not only because of the direct impact of the cases that actually are decided, but also because the existence of the remedy is needed to convince states that they must make state-wide reasonable efforts to assist families. In the absence of any other effective means of enforcement, the existence of a private cause of action is critical.

The American Bar Association relies upon the Seventh Circuit decision and respondents' brief to provide legal analysis of why a private right of action exists under the existing standards of the Court.

CONCLUSION

For the reasons stated above, the American Bar Association respectfully urges this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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